From bad to worse? On the Commission and the Council's rule of law initiatives

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The rule of law is one of the fundamental values on which the EU is founded according to Article 2 TEU. Faced with a rising number of 'rule of law crises' in a number of EU countries, the Commission adopted a new ' pre-Article 7' procedure last March in order to address any instance where there is a evidence of a systemic threat to the rule of law. Having criticised the Commission's initiative primarily on the (unconvincing) ground that it would breach the principle of conferral which governs the allocation of powers between the EU and its Member States, the Council proposed its own solution: a rule of law dialogue between national governments and to be held once a year in Brussels.

Both initiatives, and in particular, the Council's, appear grossly inadequate to tackle the problem of 'rule of law backsliding post EU accession' to quote Frans Timmermans, the First Vice-President of the Commission in charge inter alia of the Rule of Law.

Let us begin with the Commission's proposal. The rationale underlying its new mechanism is that the current EU legal framework is ill designed when it comes to addressing internal systemic threats to this principle and, more generally, to EU values. The former President of the European Commission himself called in 2013 for a 'better developed set of instruments' that would fill the space that exists at present between the Commission's infringement powers laid down in Articles 258–260 TFEU, and the so-called 'nuclear option' (suspension of a Member State's EU membership) laid down in Article 7 TEU. Both procedures suffer indeed from a number of procedural and substantive shortcomings, with the consequence that Article 7 TEU has never been triggered whereas the Commission's infringement powers have proved ineffective to remedy systemic violations of EU values.

Numerous proposals were made like prior to the publication of the Commission's Communication last March. These proposals would appear however to have been found too 'radical' for the Commission which decided instead to put forward an eminently 'light touch' mechanism (previous analysis by Steve Peers is available here). This new rule of law mechanism builds on and complements an already existing – albeit never used – procedure, the 'nuclear option' referred to above, on the basis of which the Council may theoretically suspend certain EU rights of the 'guilty' Member State such as voting rights.

In a nutshell, the Commission's new mechanism takes the form of an early-warning tool to enable the Commission to enter into a structured dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law preceding the eventual triggering of Article 7 TEU. This 'pre-Article 7' mechanism does not exclude a parallel recourse to the infringement procedure.

In practice, the Commission's new rule of law mechanism rests on three main stages:

(1) The Commission will first have to assess whether there are clear, preliminary indications of a systemic threat to the rule of law in a particular Member State and send a 'rule of law opinion' to the government of this Member State should it be of the opinion that there are;

(2) Commission's recommendation: In a situation where no appropriate actions are taken, a 'rule of law recommendation' may be addressed to the authorities of this country, with the option of including specific indications on ways and measures to resolve the situation within a prescribed deadline;

(3) Finally, the Commission is supposed to monitor how the relevant Member State is implementing the recommendation mentioned above. Should there be no satisfactory implementation, the Commission would then have the possibility to trigger the application of Article 7 TEU.

The Commission's new pre-Article 7 procedure is anything but revolutionary. In essence it merely requires any

'suspected' Member State to engage in a dialogue with no new automatic or direct legal consequences should the Member State fail to agree with any of the recommendations adopted by the Commission. Undoubtedly, Article 7(1) TEU already and necessarily *implicitly* empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. The criticism expressed by the Council's Legal Service, which has criticised the Commission for overstepping its powers, would therefore appear particularly misplaced. The Commission's framework is procedurally sound, no Treaty change is required, and for the first time a wide range of expert bodies is to be consulted: so far so good, one may be tempted to say.

This bright picture however fades a great deal as soon as one focuses on the likely effectiveness of this new procedure, which is based on the presumption that a dialogue between the Commission and the Member State is bound to produce positive results. The validity of this presumption is highly questionable. Indeed, once we move towards really problematic cases, i.e. the countries where the ruling élite has made a *conscious choice* not to comply with EU values, engaging in a rule of law dialogue is unlikely to be fruitful. Worse still: the confidential nature of the whole discussion to be held between the Commission and the Member State under investigation will prevent a successful 'name-and-shame' environment from crystallising. The non-legally binding nature of the 'rule of law recommendation' to be addressed to the authorities of the country under scrutiny, and the non-automatic recourse to Article 7 TEU should the recalcitrant Member State fail to comply, further increase the likelihood of ineffective outcomes.

The Council's negative response to the Commission's proposal leaves one rather pessimistic about the chance of ever seeing the Commission activating its new rule of law framework. Indeed, rather then supporting the Commission's rule of law framework, the Council decided instead to establish an annual rule of law dialogue to be based 'on the principles of objectivity, non discrimination and equal treatment of all Member States' and to be 'conducted on a non partisan and evidence-based approach'. The Council's response is as disappointing as it is unsurprising considering the reported unease of several national governments at the idea of letting any independent EU body look into rule of law matters beyond the areas governed by EU law. The British government, for instance, has made clear its opposition to the Commission's framework on three main grounds: It would be superfluous to the extent that the European Council and the Council of Europe would already monitor rule of law compliance within EU Member States; it would undermine the role of the Member States within the Council of the EU and finally, that the Commission and the Council would have already been successful through informal dialogue and lobbying in addressing in recent concerns on the rule of law in Member States.

Suffice it to refer to recent events in Hungary to understand that this last point is rather ludicrous. The point about the possible duplication of existing mechanisms is similarly unconvincing. To put it concisely, if multiple bodies gather data and monitor some specific aspects of EU Member States practice in relation to the rule of law, democracy and human rights, no European body currently subjects EU countries to a specific, country-based and permanent monitoring and assessment of their adherence to the rule of law broadly understood (for an overview of existing monitoring mechanisms within the Council of Europe, the EU and the UN, see this very useful report from the Bingham Centre for the Rule of Law). For instance, the Council of Europe's Venice Commission, whose work is unanimously praised, is primarily a consultative body. In the end, the criticism directed at the Commission's proposal essentially stems from the reluctance of some national governments, especially those whose rule of law records are highly questionable, to accept any potential effective form of supranational monitoring which could result in the adoption of legally binding recommendations and/or sanctions.

Viewed in this light, it is hardly surprising that while the Commission's proposal suffers from many a flaw, the Council's response goes nowhere near enough what is required to address current challenges. The latest buzzwords are used to hide an unwillingness to meaningfully act. For instance, the Council calls for an evidence-based approach but what will this mean in practice and who will in charge of collecting this evidence and analysing it? Similarly, the dialogue is supposed to take place in the Council 'following an inclusive approach', the substance of which is nowhere explained. More fundamentally, the Council is seeking to use a soft instrument, which has regularly been criticised precisely for its ineffectiveness when used by the EU to promote its values abroad. To put it concisely, the EU has set up close to forty 'human rights dialogues' with third countries but evidence ofsubstantial and concrete achievements is thin on the ground. One would have hoped a different,

stricter approach for any Member State whose authorities have made a conscious political choice of undermining EU values.

To conclude, the Commission and the Council's initiatives may leave one deeply disappointed considering the serious nature of the internal challenges faced on the rule of law front. When comparing the two initiatives, one may however argue that the Commission's is much less half-hearted and, thus, at least less counter-productive, than the Council's, which does not simply represent the triumph of empty rhetoric over genuine action but also unfortunately undermines the future legitimacy of any Commission attempt to trigger its new pre-Article 7 procedure. For a more detailed analysis, we would refer interested readers to our forthcoming Schuman Foundation policy paper, which is due to be published this spring in both English and French.

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The Commission's new pre-Article 7 procedure is anything but revolutionary. In essence it merely requires any 'suspected' Member State to engage in a dialogue with no new automatic or direct legal consequences should the Member State fail to agree with any of the recommendations adopted by the Commission. Undoubtedly, Article 7(1) TEU already and necessarily *implicitly* empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. The criticism expressed by the Council's Legal Service, which has criticised the Commission for overstepping its powers, would therefore appear particularly misplaced. The Commission's framework is procedurally sound, no Treaty change is required, and for the first time a wide range of expert bodies is to be consulted: so far so good, one may be tempted to say.

This bright picture however fades a great deal as soon as one focuses on the likely effectiveness of this new procedure, which is based on the presumption that a dialogue between the Commission and the Member State is bound to produce positive results. The validity of this presumption is highly questionable. Indeed, once we move towards really problematic cases, i.e. the countries where the ruling élite has made a *conscious choice* not to comply with EU values, engaging in a rule of law dialogue is unlikely to be fruitful. Worse still: the confidential nature of the whole discussion to be held between the Commission and the Member State under investigation will prevent a successful 'name-and-shame' environment from crystallising. The non-legally binding nature of the 'rule of law recommendation' to be addressed to the authorities of the country under scrutiny, and the non-automatic recourse to Article 7 TEU should the recalcitrant Member State fail to comply, further increase the likelihood of ineffective outcomes.

The Council's negative response to the Commission's proposal leaves one rather pessimistic about the chance of ever seeing the Commission activating its new rule of law framework. Indeed, rather then supporting the Commission's rule of law framework, the Council decided instead to establish an annual rule of law dialogue to be based 'on the principles of objectivity, non discrimination and equal treatment of all Member States' and to be 'conducted on a non partisan and evidence-based approach'. The Council's response is as disappointing as it is unsurprising considering the reported unease of several national governments at the idea of letting any independent EU body look into rule of law matters beyond the areas governed by EU law. The British government, for instance, has made clear its opposition to the Commission's framework on three main grounds: It would be superfluous to the extent that the European Council and the Council of Europe would already monitor rule of law compliance within EU Member States; it would undermine the role of the Member States within the Council of the EU and finally, that the Commission and the Council would have already been successful through informal dialogue and lobbying in addressing in recent concerns on the rule of law in Member States.

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